MOTION FILED

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No. 09-315

IN THE

# Supreme Court of the United States

DONNA KAY BUSCH,

*Petitioner,*

v.

MARPLE NEWTOWN SCHOOL DISTRICT, *ET AL.*

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF INDIAN RIVER SCHOOL DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1. Indian River School District ("Indian River") respectfully moves for leave to file an *amicus curiae* brief in support of Petitioner. All parties have received timely notice of Indian River's intent to file this brief, to which Petitioner has consented. Counsel for Respondents has not consented to Indian River's filing, thus necessitating this motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

2. Indian River is one of the largest school districts in the state of Delaware and includes fifteen different learning institutions. It employs over 600 teachers and provides a public education to more than 8,000 students each year.

3. On a daily basis, the teachers and administrators in Indian River must make decisions that affect the constitutional rights of students and parents. These rights co-exist with the goals behind public education, and it befalls each school district to strike the proper, constitutional balance between these sometimes competing interests.

4. The consequences of uncertainty when striking this balance can be severe. Indian River has experienced first-hand the detriment to public resources and public education that can ensue when there is disagreement regarding how schools should accommodate the rights of Free Speech and Free Exercise.

5. This case concerns when public schools may, may not, or must prohibit religious speech, and Indian River will bear ultimate responsibility for applying these principles to the classroom environment. The question presented directly implicates Indian River's interest in providing its teachers, administrators, and students with guidance as to the proper balance of First Amendment rights and the priorities of public education.

6. For these reasons and those set out in the accompanying brief, Indian River respectfully moves this Court to allow it to file this *amicus curiae* brief urging the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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## BRIEF OF INDIAN RIVER SCHOOL DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Located in Sussex County, Delaware, *Amicus* Indian River School District ("Indian River") is composed of fifteen different learning institutions, including seven elementary schools, three middle schools, two high schools, a magnet school for the arts, and a center for the learning disabled. Indian River is one of the largest school districts in Delaware and employs over 600 teachers. During the 2009-10 school year, Indian River will educate approximately 8,701 students, ranging in age from 5 to 21 years and representing a diversity of backgrounds. *Amicus* knows the costs of weighing these students' constitutional rights. Four years ago, students and parents brought suit against Indian River claiming that religious speech in the classroom

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[1] Pursuant to Supreme Court Rule 37.6, Indian River states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than Indian River, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties received notice at least 10 days prior to the due date of Indian River's intention to file this brief, to which Petitioner has consented. Counsel for Respondents has not consented to this filing, thus necessitating the foregoing motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

violated the First Amendment. That litigation remains pending, and has shown how uncertainty in this area can divide communities and divert public resources away from education. Indian River therefore submits this brief in the interest of seeking greater clarification of the law than the Third Circuit provided.

## STATEMENT OF THE CASE

As part of their "All About Me" program, Respondents in this case devoted a week to exploring the interests of each student in Wesley Busch's kindergarten class. Each week, one student could, among other things, invite a parent to read to the class from his or her favorite book. Pet. App. 5a. During his "All About Me" week, Wesley asked his mother to read from the Bible, and she chose five verses from Psalm 118. *Id.* at 6a.

When Wesley's teacher learned of the intended reading, however, she asked Ms. Busch to discuss the matter with the school's principal. In the hallway outside the classroom, the principal informed Ms. Busch that she could not read from the Bible because it would violate "'the law ... of separation of church and state.'" *Id.* at 7a. Ms. Busch read from another book and later brought suit under the First Amendment on behalf of both Wesley and herself. The district court granted Respondents' motion for summary judgment, concluding that, although their "action constituted viewpoint discrimination," it was permissible because it was "reasonably related to legitimate pedagogical concerns." *Id.* at 61a, 71a.

On appeal to the Third Circuit, a divided panel affirmed. The majority held that, "[c]onsistent with [their] pedagogical goals," public schools may "appropriately restrict forms of expression in elementary school classrooms," including Ms. Busch's reading of Wesley's favorite book because of its religious message. *Id.* at 14a. To find otherwise, according to the court, would permit "individual students or parents [to] use the classroom to promote any message in the guise of a pedagogically approved curricular activity" and require educators to "either forego[] valuable curricular activities or forego[] the ability to control the pedagogical direction of their classrooms." *Id.* at 15a, 16a.

The court implicitly rejected the application of heightened scrutiny that applies to viewpoint discrimination, even where speech is otherwise unprotected. Instead, the constitutionality of Respondents' actions depended on an assessment of various factors, including "'the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity.'" *Id.* at 12a (citation omitted). Recognizing the "tension" between several fundamental First Amendment principles, *id.* at 20a, the court ratified the exclusion because the speech would have been "'at cross-purposes with [the school's] educational goal and could appear to bear the school's seal of approval.'" *Id.* at 18a (citation omitted).

## SUMMARY OF THE ARGUMENT

The costs of balancing the First Amendment interests in cases involving religious speech in school and the imperatives of public education involve more than abstract ideals. Public resources are diverted from the educational system to support litigation; teachers, students, and communities become divided; and judges become enmeshed in the administration of public education. To prevent such costly disputes, the teachers and school administrators who make daily decisions in the classroom need practical and clear guidance that accurately reflects the legal principles at stake.

The Third Circuit's opinion in this case has obfuscated current law surrounding the fundamental interests of free speech, free exercise, and public education. The Third Circuit sanctioned viewpoint discrimination of religious speech on the grounds that its exclusion was reasonably related to a legitimate pedagogical interest, but failed to provide practical guidance. As a result, teachers, students, and parents will rarely feel certain whether speech is being allowed or prohibited for constitutionally legitimate reasons. Indecision on such matters will cost educators their time, effort, and resources that would be better spent in instruction. In contrast, resolution of the ambiguities created by the Third Circuit's opinion and establishment of clear guidelines will advance the educational process and permit institutions, such as *Amicus*, to focus on their educational mission.

## ARGUMENT

### I. Essential Public Resources Are Diverted From The Educational Mission Of School Districts When The Law Is Unclear.

As a public educator, Indian River's obligation is not merely to instruct each of its students in the basics of arithmetic and grammar, but to instill fundamental values. To that end, teachers work daily with parents and school administrators to develop curricula that will ensure Indian River's students attain the knowledge, skills, and attitudes needed to realize their potential. These curricula, and the classroom discussions they naturally foster, include matters of both social relevancy and personal import. Indian River also supports a multitude of student groups, and makes its meeting places and other resources available to non-student community organizations.

*Amicus* is sensitive to the constitutional implications involved in public education. Every day, teachers and administrators must make difficult, on-the-spot decisions that affect the constitutional rights of Indian River's students. Of these, questions regarding religion-oriented speech are among the most challenging. Each decision must properly balance the individual's freedom of speech, the First Amendment's prohibition of state-sponsored religion, and the particular educational objectives at stake, and usually requires split-second evaluation in the demanding environment of the classroom.

In order to make sure that its staff can properly strike this balance, Indian River regularly consults

with outside counsel on legal developments that may affect school curricula. Teachers and administrators also attend educational conferences and panel discussions that focus on First Amendment issues, and new programs are reviewed to ensure they properly take into account both Indian River's academic mission and its students' individual freedoms.

Despite these measures, Indian River has recently experienced the consequences of uncertainty in this area. In *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005), four students and their parents brought suit against Indian River under the First Amendment, alleging, among other things, that classroom references to religion and student organizations that studied religious scripture helped establish a state-sponsored religious presence at certain Indian River schools. That litigation remains pending, and over the last four years has subsumed significant amounts of public funds that would otherwise be dedicated to education, has demanded constant attention from administrators who must oversee fifteen different schools, and has caused rifts in local communities.

Indian River recently revised several policies, including those regarding religious speech at school. Each policy is only as valuable as the extent to which it accurately reflects applicable law. Without straightforward guidance, the teachers and administrators making on-the-spot decisions in the classroom about student speech cannot be certain they are fully respecting the fundamental interests at stake. As the *Dobrich* case has vividly demonstrated for Indian River, the costs of inaccuracy include the

loss of tangible resources. Particularly when religion is involved, every speech-related decision can give rise to heated disputes that redirect valuable public resources from the educational system to the court system.

After revising its policies, Indian River learned of the Third Circuit's opinion in this case and began trying to apply its principles in practice. As set forth more fully below, Indian River believes that the Third Circuit's opinion will create significant confusion and conflict among those who administer and utilize public education. In blurring the scope of fundamentally important constitutional rights that teachers must apply daily, the Third Circuit has overly complicated any attempt to delineate sensible school policy and increased the likelihood of costly litigation at the expense of taxpayers and schoolchildren.

## II. The Court Should Grant The Writ Of Certiorari Because The Third Circuit's Decision Will Create Confusion And Conflict In An Area Of Fundamental Constitutional Rights.

The Court should grant certiorari to clarify the important First Amendment issues in this case. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989) (granting certiorari "to clarify the legal standard [for] regulation of the time, place, or manner of protected speech"). As one of nineteen school districts in Delaware, Indian River is responsible for the daily supervision of over 8,000 students who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse

gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). And, as the court of appeals noted, in cases involving religious speech in public schools, fundamental First Amendment principles are often in "tension" with each other. Pet. App. 20a. Indian River's paramount concern is being able to efficiently and accurately determine when the exclusion of religious speech such as Petitioner's is an appropriate classroom regulation, when it is constitutionally compelled, and when it amounts to impermissible viewpoint discrimination. Doing so requires providing school administrators with clear guidance.

1. The Third Circuit's decision fails to provide this guidance because the court did not consider how a school district like *Amicus* should evaluate the other constitutional implications of its conduct. As this Court has noted, "something that is 'quintessentially religious' or 'decidedly religious in nature'" can be properly thought of as "the teaching of morals and character development from a particular viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001). To discriminate between speakers based solely on the religious content of their speech has thus traditionally been considered a form of impermissible viewpoint discrimination, and a school cannot exclude speakers based only on their religious viewpoint. *Id.* at 112; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (finding unconstitutional viewpoint discrimination where a university "selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints").

Moreover, when Indian River opens its schools to outside speakers, it may not select for the content of their messages. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court found impermissible viewpoint discrimination where a school district allowed "school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393; *see also id.* at 392-93 ("[A]ccess to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn ... are viewpoint neutral.").

Similarly, in *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.), the Third Circuit held that an elementary school could not exclude a group of born-again Christians from participating in school-related activities with other community groups, such as posting flyers at the school and distributing them to students. "To exclude a group simply because it is controversial or divisive is viewpoint discrimination" and therefore unconstitutional. *Id.* at 527. This was true even where a group is "attempt[ing] to recruit new members and persuade them to adopt the group's views." *Id.* at 528. *See also C.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting) ("The Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination.").

The Third Circuit has also observed that "[i]ndividual student expression that articulates a particular view but that comes in response to a class

assignment or activity would appear to be protected." *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 272, 279 (3d Cir. 2003). To illustrate this point, the court suggested a school could not prohibit "a student in 'show and tell' [from passing] around a Christmas ornament or a dreidel, and describ[ing] what the item means to him" because the student was "expressing himself in the context of a school assignment or activity where the school has sought students' personal views." *Id.* at 278.

But under the Third Circuit's analysis in this case, a series of factors — "'the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity'" — will determine whether the exclusion of religious speech is reasonable and, therefore, constitutionally permissible. The majority opinion simply omitted any discussion of cases like *Lamb's Chapel*, *Good News Club*, and *Child Evangelism*, and offered no explanation for how school districts like Indian River should apply the reasonableness factors or reconcile them with existing First Amendment precedent. While the opinion indicates that schools can prohibit speech because of its religious content, the court failed to do so in a manner that will preempt claims of viewpoint discrimination from those who are restricted from speaking based solely on the content of their message.

2. In addition, the Third Circuit's reliance on this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), fails to explain how school districts must resolve the admitted "tension"

between the different First Amendment rights at stake. *Hazelwood* involved neither religious speech nor the Establishment Clause, and the Court did not have occasion to consider how those interests interact with schools' ability to prohibit speech. In both *Good News Club* and *Lamb's Chapel*, this Court rejected the argument that the speech at issue could be attributed to the school itself. *See Good News Club*, 533 U.S. at 118 (noting the community "could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"); *Lamb's Chapel*, 508 U.S. at 395 (observing "no realistic danger that the community would think that the District was endorsing religion or any particular creed"); *see also Rosenberger*, 515 U.S. at 845 ("To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint."). Likewise, in a case where teachers were distributing religious flyers to elementary students, the Third Circuit previously held that the speech could not be attributed to the school. *Child Evangelism*, 386 F.3d at 531-32.

Without analyzing any of these decisions, the court in this case held that a school district may prohibit religious speech if the message "'could appear to bear the school's seal of approval.'" Pet. App. 18a (citation omitted). This Court has previously rejected similar reasoning. *See Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (holding that a public university could not justify an exclusion of religious speech with concerns about advancing religion). The Third Circuit's failure to directly address the unique First Amendment issues relating to religious speech in public schools further confuses

an already challenging area of fundamental constitutional freedoms, and school districts like Indian River will be less certain that their teachers and administrators are properly balancing students' constitutional rights when making the daily decisions their jobs require.

3. Aside from the Third Circuit's omissions, the substance of the court's opinion is equally bereft of meaningful guidance. The court's attempted distinction between "show and tell," in which there may be a constitutional right to discuss Christmas ornaments and dreidels, and "a school's organized, curricular activities," where such speech may be excluded, is hopelessly imprecise. *See* Pet. App. 13a-14a. Particularly in the elementary school context, teachers and administrators do not merely implement "organized curricular activities," but oversee multi-faceted, year-long programs meant to introduce students to new concepts and enrich their understanding of the world. Blending personal viewpoints is often a cornerstone of the curriculum, and Respondents' "All About Me" program — designed to help children "identify individual interests and learn about others" — is a perfect example. *Id.* at 5a. Particularly where students and parents like Petitioner have been invited to share their interests, consensus about the reasonableness of excluding those viewpoints because of their content is unlikely. Indian River cannot perceive any manner by which it could apply the Third Circuit's reasoning to daily school activities in a way that forestalls more costly litigation.

* * *

The *Dobrich* case illustrated for Indian River that uncertainty in the area of our constitutional rights can exact costs well beyond our First Amendment liberties: Strained educational budgets divert resources to support litigation; teachers, students, and communities are divided; and judges become enmeshed in the administration of public education. Indian River's only interest is being able to properly balance these liberties without compromising its mission to provide public education. Doing so requires better guidance than the Third Circuit provided. In the absence of additional clarification, unresolved questions about how to meaningfully apply the court's ruling will invariably lead to more costly litigation. This Court should provide that clarification.

## CONCLUSION

For all of the foregoing reasons, *Amicus* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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